Filed 6/5/19 McClain v. James A. Nelson Co., Inc. CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

GLORIA MCCLAIN, et al., Plaintiffs and Appellants, v. JAMES A. NELSON CO., INC., Defendant; CENTURY INDEMNITY CO., Intervener and Respondent.	A152045 (San Francisco County Super. Ct. No. CGC-10-275596)

The plaintiffs in this wrongful death action appeal the trial court's order granting the motion of respondent Century Indemnity Co. (Century) to vacate a default judgment against defendant James A. Nelson Co., Inc. (Nelson Co.). We affirm.

BACKGROUND

In 2010, the wife and children of Tommy McClain (Plaintiffs) filed a wrongful death lawsuit against numerous defendants, including Nelson Co., alleging the decedent died as a result of asbestos exposure. Nelson Co. was served with the summons and complaint in June 2011. In September 2011, Plaintiffs requested entry of default as to Nelson Co. In May 2014, Plaintiffs sought a default judgment against Nelson Co. A default judgment against Nelson Co. of more than $2 million issued in September 2014.

In March 2017, Century—the successor company to an insurer of Nelson Co.—filed a motion to set aside the default judgment against Nelson Co. on the ground of

extrinsic mistake. The trial court granted the motion, setting aside the default judgment "as to Century Indemnity only," leaving the default judgment in place as to any other liable or potentially liable parties. This appeal followed.

DISCUSSION

I. *Appealability*

Century contends the order is nonappealable. While conceding that orders granting statutory motions to set aside or vacate a final judgment are appealable, it argues that orders granting nonstatutory motions are not. We disagree.

"[A]n order vacating a final judgment" is appealable. (Code Civ. Proc., § 904.1, subd. (a)(2).) Cases finding orders granting statutory motions to vacate a final judgment appealable rely on this provision. (*Concerned Citizens Coalition of Stockton v. City of Stockton* (2005) 128 Cal.App.4th 70, 80 ["Generally, a direct appeal may be taken from an order vacating a final judgment. (See § 904.1, subd. (a)(2) . . . .)."]; *County of Stanislaus v. Johnson* (1996) 43 Cal.App.4th 832, 834 ["This is an appeal from an order vacating a default and default judgment pursuant to Code of Civil Procedure section 473. The order is appealable as an order after final judgment." (fn. omitted)].) Century attempts to distinguish cases cited by a prominent treatise for the proposition that orders granting nonstatutory motions to vacate are appealable. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2018) ¶ 2:166.) But Century fails to explain why the cases finding orders granting statutory motions to vacate appealable as orders after final judgment do not apply equally to nonstatutory motions.[1]

Century contends there is no longer a final judgment because the trial court's order set it aside, and therefore the appealed-from order is not an order after judgment. Century fails to explain how this argument can be reconciled with the cases holding

[1] Cases involving orders *denying* a motion to vacate, relied on by Century, are inapposite. (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2018) ¶ 2:169 ["As a general rule, orders *denying* a motion to vacate are *not* appealable, because any assertions of error can be reviewed on appeal from the judgment itself. To hold otherwise would effectively authorize two appeals from the same decision."].)

orders granting statutory motions to vacate appealable as orders after judgment. *Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, relied on by Century, involved a materially different scenario: a final judgment was reversed on appeal, and the trial court subsequently issued an order awarding attorney fees for work incurred in prosecuting the appeal. (*Id.* at p. 1012.) As an initial matter, contrary to Century's assertion, the Court of Appeal "d[id] not decide . . . whether the order granting Apex's motion for attorney fees was directly appealable under section 904.1(a)(2)" because it found the order appealable on another ground. (*Id.* at p. 1015, fn. 1.) In any event, *Apex's* holding that "[t]he effect of a general reversal is to create a situation where no judgment is deemed to have been entered" (*id.* at p. 1015) does not apply here: If we reverse the appealed-from order setting aside the judgment, the judgment will be reinstated. Accordingly, the order is appealable as an order made after final judgment.[2]

II. *Extrinsic Mistake*

"A trial court has inherent power to vacate a default judgment on equitable grounds. [Citations.] 'One ground for equitable relief is extrinsic mistake—a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits.' [Citation.] '[E]xtrinsic mistake exists when the ground of relief is not so much the fraud or other misconduct of one of the parties as it is the excusable neglect of the defaulting party to appear and present his claim or defense. If that neglect results in an unjust judgment, without a fair adversary hearing, the basis for equitable relief on the ground of extrinsic mistake is present.' [Citations.] [¶] To qualify for equitable relief based on extrinsic mistake, the defendant must demonstrate: (1) 'a meritorious case'; (2) 'a satisfactory excuse for not presenting a defense to the original action'; and (3) 'diligence in seeking to set aside the default once the fraud [or mistake] had been discovered.' [Citations.] When 'a default judgment has been obtained, equitable relief may be given only in exceptional circumstances.' " (*Mechling v.*

[2] Century also contends only one of the plaintiffs can prosecute the appeal because the notice of appeal only identified one plaintiff. Because, as explained below, we affirm the trial court's order, we need not decide this issue.

Asbestos Defendants (2018) 29 Cal.App.5th 1241, 1245–1246, fn. omitted (*Mechling*)) As Plaintiffs do not dispute, an insurer, to protect its own interests, may move to set aside a default judgment entered against its insured. (*Western Heritage Ins. Co. v. Superior Court* (2011) 199 Cal.App.4th 1196, 1210.)

"We review the order granting [Century's] motion to set aside the default and default judgment for abuse of discretion. [Citation.] The law 'favor[s] a hearing on the merits whenever possible, and . . . appellate courts are much more disposed to affirm an order which compels a trial on the merits than to allow a default judgment to stand.' " (*Mechling, supra*, 29 Cal.App.5th at p. 1246.)

Plaintiffs contend that Century failed to demonstrate any of the three requirements for equitable mistake. In their reply brief, however, they acknowledge that we rejected similar arguments in *Mechling,* a case with "nearly identical facts," and concede that if *Mechling* remains "good law . . . it will be dispositive" in this case. After Plaintiffs filed their reply brief, the California Supreme Court denied review in *Mechling*. (*Mechling, supra,* 29 Cal.App.5th 1241, review denied Mar. 20, 2019, S253687.) As we explain below, we agree that *Mechling* controls.[3]

Plaintiffs contend Century failed to establish a meritorious defense because it did not submit a proposed pleading showing a valid defense and declarations containing supporting facts. To establish a meritorious defense, "only a minimal showing is necessary. [Citation.] The moving party does not have to guarantee success, or 'demonstrate with certainty that a different result would obtain . . . . Rather, [it] must show facts indicating a sufficiently meritorious claim to entitle [it] to a fair adversary

[3] *Mechling* resolved four consolidated cases. In two of the four cases, the plaintiffs submitted evidence that the insurance company had actual notice of the lawsuit before the default judgment entered (the insurance company apparently mistakenly believed it had not issued a policy to the defendant). (*Mechling, supra,* 29 Cal.App.5th at pp. 1244–1245.) There is no evidence of any such notice in the case before us and the analysis in *Mechling* specific to those cases does not apply here. In the remaining two *Mechling* cases, as here, there was no evidence the insurance companies had actual notice of the lawsuit prior to entry of the default judgment. (*Ibid.*)

hearing.' " (*Mechling, supra,* 29 Cal.App.5th at p. 1246.) A proposed responsive pleading is not necessary to satisfy this requirement. (*Id.* at pp. 1247–1248.) As in *Mechling,* here Plaintiffs obtained a default judgment worth millions of dollars in a wrongful death action. (*Id.* at pp. 1246–1247.) Moreover, the register of actions establishes that many of the dozens of named defendants appeared and defended against Plaintiffs' case, filing motions for summary judgment or summary adjudication, filing numerous in limine motions in advance of trial, and securing dismissals or settlements before or during trial. That other defendants vigorously defended against Plaintiffs' complaint suggests a meritorious defense is also available to Century. In addition, the default judgment included $1.6 million in noneconomic damages. The appropriate amount of noneconomic damages is a determination " ' "on which there legitimately may be a wide difference of opinion" ' " (*Janice H. v. 696 North Robertson, LLC* (2016) 1 Cal.App.5th 586, 602), further indicating the availability of a meritorious defense. The record before us is sufficient to conclude that Century met the "minimal showing" necessary.

Plaintiffs next contend Century failed to demonstrate a satisfactory excuse for not presenting a defense in the lawsuit. As in *Mechling,* it is undisputed that Century "was not a named party and was not served with the complaint[] or other relevant pleadings." (*Mechling, supra,* 29 Cal.App.5th at p. 1248.) As Plaintiffs note, Century did not submit direct evidence that it had no actual notice of the lawsuit before the default judgment entered. Instead, Century submitted a declaration from its counsel averring that "Century Indemnity never had the opportunity to participate in this lawsuit . . . ." The trial court inferred from this averment that Century did not learn of the lawsuit until after the default judgment issued. Although it would have been far preferable—and not burdensome—for Century to submit evidence directly addressing the issue, we cannot say the trial court's

inference is entirely unreasonable. Century's lack of awareness of the lawsuit establishes a satisfactory excuse for not participating in the original action.[4] (*Mechling*, at p. 1248.)

Finally, Plaintiffs argue Century failed to establish diligence in seeking to vacate the judgment once the mistake was discovered. Century submitted a declaration from its counsel averring that: it "retained counsel in November 2016 to defend any asbestos claims against [Nelson Co.]"; in "late December 2016," Century's counsel was informed by Plaintiffs' counsel "that there were upwards of 70 known cases involving [Nelson Co.]"; Century's counsel "conducted its own investigation of court dockets to identify [Nelson Co.] cases and whether there were default judgments taken in other California jurisdictions"; and Century's counsel "did not discover the default judgment in this case until after January 3, 2017." As Plaintiffs argue, this evidence addresses the timeline of *counsel's* knowledge of the lawsuit, but does not expressly identify when Century itself learned of the suit. Again, it would have been better for Century to include direct evidence of the date of its own knowledge. Nonetheless, it was not entirely unreasonable for the trial court to infer that, had Century known of the lawsuit and default judgment, it would have informed its attorneys promptly upon retaining counsel, and therefore that Century did not know of the lawsuit and default judgment until its counsel did. With this inference, Century filed the motion to vacate promptly, two months after learning of the default judgment. (See *Mechling*, *supra*, 29 Cal.App.5th at pp. 1248–1249.)

We emphasize that " '[a] finding . . . based upon a reasonable inference . . . will not be set aside by an appellate court unless it appears that the inference was wholly irreconcilable with the evidence. [Citations.]' [Citation.] '[W]hen the evidence gives rise to conflicting reasonable inferences, one of which supports the finding of the trial court, the trial court's finding is conclusive on appeal.' " (*Phillips v. Campbell* (2016) 2 Cal.App.5th 844, 851.) We also emphasize, as we did in *Mechling*, that "our review of the trial court's ruling is governed by the deferential abuse of discretion standard. As a

[4] The parties' arguments about whether Nelson Co. had a satisfactory excuse for not participating are irrelevant.

result, we may reverse only if we conclude the trial court's decision is ' "so irrational or arbitrary that no reasonable person could agree with it." ' [Citation.] That a different decision could have been reached is not sufficient because we cannot substitute our discretion for that of the trial court. The trial court's ruling must be beyond the bounds of reason for us to reverse it." (*Mechling, supra*, 29 Cal.App.5th at p. 1249.) The inferences the trial court drew from Century's evidence were not unreasonable, and the court's order granting Century's motion to vacate the default judgment was not beyond the bounds of reason. We therefore affirm.[5]

DISPOSITION

The order is affirmed. Respondent shall recover its costs on appeal.

[5] We need not and do not resolve Century's alternative argument that Plaintiffs were not entitled to a default judgment.

SIMONS, J.

We concur.

JONES, P.J.

BURNS, J.

(A152045)